



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1230 OF 2015**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**NAFTALI NDUMBE MWANGI.....CLAIMANT**

**VERSUS**

**IPSOS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant had a long and decorated career in the employment of the Respondent spanning over 13 years, rising from the position of Accountant to the Regional Chief Finance Officer of the organisation with impressive salary increments and evaluation results. This meteoric rise was brought to an abrupt end on the evening of 15<sup>th</sup> October 2014 when the Claimant's employment was terminated by the Respondent through Mr. Rupert Van Hullen, a Director of the Respondent and In-house Counsel for the United Kingdom and Ireland, Germany, Switzerland, Austria, Romania, Ukraine, Russia, Kazakhstan and Sub-Saharan Africa, who was then based in London.

2. The Respondent invoked Clause 7(a)(iv) of the contract of employment dated 18<sup>th</sup> December 2012 which provided inter alia, "...The company may terminate your employment either with or without notice for cause. In case of termination with notice, the company shall give you three (3) months' notice of termination or pay you three (3) months' salary in lieu of notice. Termination without notice will be summary and will take effect immediately upon notification by the company."

3. The termination letter dated 15<sup>th</sup> October 2014 informed the Claimant that he would not be required to work during the notice period which he could take as leave but would be remunerated for the duration. He was also requested to immediately return all company property in his possession including mobile phone, laptop and bank account access tokens. Finally he was requested to resign as a Director of the Company as well as Director of IPSOS Ltd Ghana and any other Companies owned or controlled by IPSOS South Africa. Draft letters of resignation from directorships and an affidavit were enclosed for the Claimant's signature.

4. Instructively, the letter of termination had no reason or justification for the termination or tabulation of his entitlements. The letter and the other documents were handed over to the Claimant on the night of 15<sup>th</sup> October 2014. The Claimant declined to sign the affidavit and the resignations from directorship.

5. Aggrieved by the termination, the Claimant instituted proceedings against the Respondent by a memorandum of claim dated and filed on 14<sup>th</sup> July 2015 seeking the following reliefs –

*a) Termination dues which is tabulated as below:*

*(i) Interest at court rates on the 3 months' pay*

*(3 x 1,590,000 x x ) Kshs.143,100*

*(ii) Unpaid 3 months from the 6 months termination notice*

*(3 x 1,590,000) Kshs.4,770,000*

*(iii) Compensation for unfair termination*

*(12 x 1,590,000) Kshs.19,080,000*

(iv) *Non-compete payments*

(12 x 1,590,000) Kshs.19,080,000

(v) *Redundancy payment*

(1 x 1,590,000 x 13) Kshs.19,080,000

(vi) *Director's compensation (\$1,000 x 4 x 5) \$20,000*

(vii) *Interest at court rates on the 3 months' pay ( x 1,590,000) + ( x 1,590,000) Kshs.8,061,800*

b) *The Claimant's Constitutional rights have been infringed.*

c) *General damages for defamation.*

d) *Compensation for the infringement of the Claimant's constitutional rights for the sum of Kshs.5,000,000*

e) *A declaration that the Claimant validly remains a Director in Ipsos Market Research Services Ltd- Nigeria, Ipsos Tanzania Limited, Ipsos Limited- Uganda, Kenya and Ipsos Limited- Ghana.*

f) *Interest at court rates on (a) (c) and (d) above.*

g) *Costs of this suit.*

h) *Any other order this court may deem fit to grant.*

6. The Respondent filed its response to the memorandum of claim on 6<sup>th</sup> August 2014 praying that the Claimant's claim be dismissed with costs to the Respondent.

#### **Claimant's Case**

7. The Claimant averred that he was engaged by the Respondent on 26<sup>th</sup> November 2001 as an Accountant at a consolidated salary of Kshs.45,000 per month and as a diligent, dedicated and loyal worker, rose to the position of Senior Accountant, Regional Accountant/Regional Internal Auditor at a monthly salary of Kshs.90,000, Finance Manager at Kshs.140,000 per month, Finance Director at Kshs.330,000 and later as the Finance and Administration Manager at Kshs.505,000 per month. By 2012, the Claimant had risen to the position of Chief Finance Officer, Pan Africa at a monthly salary of Kshs.1,500,000. The Respondent had a presence in 87 countries globally and the Head Quarters for Pan Africa was in Nairobi where the Claimant was based. That due to his diligence and hardwork, his salary was reviewed to Kshs.1,590,000 per month effective 1<sup>st</sup> July 2014, about 3½ months before termination.

8. He further averred that two senior officials of the Respondent arrived in Kenya on or about 13<sup>th</sup> October 2014. These were Mr. Rupert Van Hullen and one Olivier Champourlier. The latter was the IPSOS CFO for Europe, Middle East and Africa (EMEA) based in Paris France. The two reported to the office in 14<sup>th</sup> October 2014. The Claimant avers that he worked with Olivier the entire day on different aspects of the Respondent and its affiliates. Mr. Rupert would come in for specific documents and leave. That around 5.20 pm, the Claimant was summoned by the two officials to the Boardroom where he was requested to tender his resignation immediately. On declining to do so, Mr. Rupert handed to him the letter of termination as well as notices of resignation as a Director of the five (5) IPSOS affiliated companies where he served as a Director.

9. That his request for a specific explanation for the decision was not provided other than the fact that he was no longer needed in the organization, that he sought legal advice in the issue from his Counsel who arrived at about 7.00 pm. Mr. Rupert and Olivier supervised clearance and retrieval of personal items by the Claimant by which time he had been logged out of the computer system and personal emails deleted from the Respondent's cell phone. That with the help of his Counsel, Mr. Rupert and Olivier agreed in writing that he could retrieve his personal items the following day latest by 2 pm as the letter dated 16<sup>th</sup> October 2014 confirms. It was signed by Mr. Rupert.

10. The Claimant further avers that he was humiliated by the two officials who had to read through the documents he retrieved yet he had no prior notice of the exercise. That the suggested grounds of termination, namely performance issues, acts of omission or negligence were inventions of Mr. Rupert and Oliver and no warning letter or notice to show cause had been given at any time during the 13 years of service.

11. The Claimant avers that he was not afforded an opportunity to respond to any claim by the Respondent and that the termination was actuated by malice. That he suffered mental and psychological pain due to the online publications by "Kenya Bwala" and "Kahawa Tungu" and the same compromised his chances to secure alternative employment.

12. The Claimant averred that the "new way" program by the Respondent was a restructuring and therefore his termination was a redundancy in disguise and that the Pan Africa region was subsequently re-organised into two clusters East and West Africa.

13. That he was not remunerated as a Director for the five (5) affiliates of IPSOS Limited for a period of four (4) years, yet one Mr. R. Simeza, an Advocate was paid for having been a Director for 8 years. That he had 108 outstanding leave days from 2001 to 10<sup>th</sup> October

2014 and that he was only permitted to be on leave for 21 days per year.

14. That under the employment contract dated 1<sup>st</sup> July 2008, the Claimant was entitled to six (6) months' notice of termination and that the contract dated 18<sup>th</sup> December 2012 reduced it to three (3) months and the latter was a nullity. The Claimant received payment for three (3) months and is claiming the balance of three (3) months.

15. In addition, the Claimant avers that since the contract of 18<sup>th</sup> December 2012 contained a non-compete Clause 6(b)(i), not to work for competitors in a wide geographical area, for up to 12 months on termination, he is entitled to non-compete payments and that efforts to negotiate an out of court settlement with the Respondent fell through.

16. The Claimant concludes that the termination was unlawful, wrongful, malicious, unfair and unjustified for want of –

(i) Reasons for termination and invitation to respond to the reasons and defend himself.

(ii) Compliance with the principles of natural justice, the Employment Act, 2007 and the International Labour Organisation Convention (ILO) No. 158.

### **Respondent's Case**

17. The Respondent denies the Claimant's allegations and avers that it contracted with the Claimant under a contract dated 18<sup>th</sup> December 2012 effective 26<sup>th</sup> November 2001. That the contract would remain in force until terminated and the parties thereto were bound by its terms and conditions.

18. That the Claimant was terminated pursuant to Clause 7(a)(iv) of the contract of employment and had been informed and was aware of the financial issues which culminated in his termination. That the Claimant's fundamental rights were not infringed and he had accepted to be a Director of subsidiaries of companies of IPSOS Limited at no extra pay as per Clause 1(d) of the contract of service and his mandate as a Director expired on termination on 15<sup>th</sup> October 2014.

19. That the leave days claimed by the Claimant were unrealistic. That an employee could only carry forward a maximum of 5 days per calendar year as per Clause 4.7.3 of the Human Resource Policies and Procedures and that the outstanding days were paid as part of terminal dues.

20. That the Claimant was terminated in accordance with the contract dated 18<sup>th</sup> December 2012 and was not declared redundant. That the position of CFO Pan Africa was subsequently re-advertised.

21. That arising from the failures of the Claimant tabulated in pages 4 – 5 of the Respondent's response to the memorandum of claim, the Respondent suffered a loss of Kshs.320,000,000 and a severe financial crisis and had to borrow USD 150,000 to pay its bills.

22. That the Claimant received a bonus in 2014 in breach of policies and procedures applicable to the Respondent. The Respondent acted bona fide in the termination and paid for the three (3) months' notice and had even proposed a settlement by letter dated 11<sup>th</sup> February 2015. That the Claimant was not discriminated and the relevant provisions of the Employment Act, 2007 were complied with. That the claim for non-compete payment had no legal basis.

23. The Respondent prays that the Claimant's claim be dismissed with costs to the Respondent.

### **CLAIMANT'S SUBMISSIONS**

24. The Claimant's Counsel submitted that it was common ground that there was a contract of service between the parties and the Claimant was an employee of the Respondent.

25. On whether the Claimant's termination on 15<sup>th</sup> October 2014 was lawful, Counsel referred to Section 3(1) of the Employment Act on application of the Act, and Section 2 on the definition of a contract of service. Further reference was made to Clause 12(e) of the Executive Employment Agreement dated 18<sup>th</sup> December 2012, on the laws applicable. Sections 35, 41 and 43 were invoked to underscore the legal framework on termination of contracts of service in relation to notice period or absence thereof as well as the procedural parameters and burden of proof.

26. On validity of reasons for termination, Counsel reiterated the contents of paragraph 7 of the memorandum of claim on how the Claimant was summoned by Mr. Rupert and Mr. Olivier Champourier to the boardroom of the Respondent who demanded that he resigns from the Company with immediate effect and that he was not informed of the reasons(s) for the termination. Reference was made to the first paragraph of the termination letter dated 15<sup>th</sup> October 2014 to underline the fact that the letter did not give any reasons for the termination. Paragraph 2 of the Respondent's response to the demand letter of 31<sup>st</sup> March 2015 reiterated the fact that the Respondent's letter dated 15<sup>th</sup> October 2015 gave no reason for the Claimant's termination. Additional reference was made to the Respondent's reply dated 16<sup>th</sup> February 2015 whose paragraph 2 appeared to make reference to reasons for the Claimant's termination, principally "*performance issues and serious act of omission and negligence.*"

27. Counsel submitted that this was the first encounter with the reason(s) why the Claimant was terminated, adding that particulars of these allegations were not provided. Counsel made reference to a host of previous correspondence between the Claimant's and the Respondent's

advocates to demonstrate that the Respondent was trying to invent belated reasons for the Claimant's termination. The Respondent's letter of 17<sup>th</sup> April 2015 stated in part *"our client has gone out of their way and policies based on the number of years your client served without blemish and reconsidered under the policy of give and take subject to the approval of the Board of Director as under."*

28. Counsel contended was an explicit acknowledgement that the Claimant had served the Respondent in an exemplary manner. This response led to the filing of this claim. In response, the Respondent conjured up what Claimant's Counsel referred to as *"invented reasons"* for termination namely:

- (a) Failure to the shareholders and is Line Manager that the second quarter of 2014 statutory accounts of the Respondent for 2012 and 2013 had not been finalised.
- (b) Failure to ensure that the accounts were finalised in a timely manner.
- (c) Failure to address the issues raised by the auditors on the said accounts
- (d) Failure to alert the shareholders in line with the company policies
- (e) Failure to realize the constant lack of cash funds compared to the purported profitability of the company shown in the management accounts.
- (f) Failure to detect the fact of such fails of fraudulent bookings since 2012.
- (g) Failure to detect booking errors or fraudulent booking in Tanzania and Uganda of Kshs.118,852,000

### **Termination as per the terms of the Contract**

29. Counsel submitted that paragraphs 4 and 5 of the Respondent's response was unequivocal that the Claimant's employment was terminated as per Clause 7(a)(iv) of the employment contract dated 18<sup>th</sup> December 2012. Paragraph 6 paraphrased Clause 7(a)(iv) on termination. Counsel further submitted that there was confusion on the nature of termination because paragraph 3(b) of the Respondent's letter of 31<sup>st</sup> March 2015 stated that the Claimant's termination was effected in accordance with Clause 7(a)(iv) read with Clause 7(b) that such a construction would constitute summary dismissal yet the Respondent gave the Claimant a three months' notice.

30. On the reasons for termination allegedly given during the day long meeting on 15<sup>th</sup> October 2014, with Mr. Rupert and Mr. Olivier, Counsel submitted that the Claimant spent the day working with both officials on financial forecasting for 2014 and budget plans for 2015 and was only summoned to the boardroom after 5 pm where Mr. Rupert and Mr. Olivier demanded that he resigns and subsequently handed over documents requiring him to resign as Director of IPSOS and its affiliated companies. Counsel discounted the Respondent's submissions that the Claimant was informed of the reasons for termination during the meeting. Counsel submitted that Mr. Rupert had in oral evidence admitted that he had prepared the directorship resignation letters and signed the termination letter at around 3.00 pm on 15<sup>th</sup> October 2014 and that the issue of termination of Claimant's employment only came up during the meeting summoned after 5.00 pm, that when the Claimant refused to resign, he was yelled at and abused by Rupert and Mr. Olivier.

31. On allegations on statutory accounts, Counsel submitted that the Claimant explained the issues on finalization of the 2012 and 2013 accounts. That the contents of the Claimant's email communication was not challenged. It was further submitted to that Mr. Rupert had admitted that the Respondent had polices on preparation of accounts and many employees participated in ensuring that the accounts were uploaded in the Respondent's database by 30<sup>th</sup> June every year. Reference was made to an email communication from one Pauline Baron on the uploading of accounts by 30<sup>th</sup> June 2012 that the delay was occasioned by the resignation of the Chief Finance Officer for Kenya.

32. On the allegation that the Claimant failed to report to the shareholders, Counsel submitted that Mr. Rupert had admitted that the Respondent's group organization chart had different levels of officials above the Claimant who was not reporting directly to shareholders.

33. In regard to alleged financial loss, the Counsel submitted that notwithstanding the gravity of the allegations against the Claimant, Mr Rupert declined to respond to questions based on the financials by asserting that he was a Lawyer not an Accountant. It is trite law that he who alleges must prove, refusal to respond to questions on financials meant that Mr Rupert' statement on the financials should be considered as having been withdrawn, Counsel submitted.

34. It was submitted that the Claimant had explained the challenges the Respondent was facing in its migration to Symphony, a new ICT system which required recognition of revenue before the contracts were signed through straight line revenue recognition policy and many entries would be reversed if the contract fell through, leading to book loss as opposed to financial loss. Counsel further submitted that the challenges that led to reversals of income were explained in an internal memorandum dated 3<sup>rd</sup> October 2014. Moreover, the challenge was not unique to Pan Africa. It affected many countries.

### **Bonus Payments**

35. Counsel submitted that contrary to the Resident's allegation that the Claimant received bonus payment contrary to the polices of the Respondent, the Claimant was duly paid a 13<sup>th</sup> salary postponed from December 2013 which was contractual though it was financed by funds set aside for bonus payments, that the Claimant only split out the amount for each country according to instructions received from his seniors; that Mr. Rupert had admitted in cross examination that bonus was paid to all eligible employees and that the Respondent could have recovered the payments if they had been paid irregularly and no attempts were made to recover bonus paid in 2014.

36. In sum, Counsel submitted that the Respondent had no valid reason to terminate the Claimant. The “*invented reasons*” were only raised after the suit was filed.

37. On whether the Claimant was given an opportunity to respond to the allegations, (if any), Counsel relied on Section 41 of the Employment Act. He submitted that the Claimant was summoned to the Boardroom by Mr. Rupert and Mr. Olivier after 5 pm who demanded his resignation from the Respondent’s employment, that Mr. Rupert admitted on cross examination that he had prepared the documentation earlier in the afternoon (around 3 pm). That the Respondent provided no documentation or evidence on who telephoned the Claimant or communicated the allegations for a response from the Claimant, that Mr. Rupert and Mr. Olivier had travelled to Kenya to terminate the Claimant. Counsel submitted that the termination did not comply with the tenets of procedural fairness, citing Section 45 of the Employment Act in support.

38. It was further submitted that the Respondent did not provide a valid reason for the termination, that the Claimant was hounded out of office in a humiliating and disgraceful manner. Counsel invoked Section 45(5) of the Employment Act to reinforce the submission and that no warning letter had been issued to the Claimant before termination.

### **Restructuring**

39. On whether the Claimant was terminated as a consequence of restructuring, Counsel submitted that the Respondent was restructuring its operations to what is christened “*The New Way*” to institute a new market approach, organisational structure, service offer and tools, that the restructuring culminated in the creation of East Africa and West Africa clusters as per the memorandum dated 1<sup>st</sup> April 2015 to all staff of IPSOS Pan Africa and Claimant’s position was abolished, that the Respondent shyed away from referring to the restructuring as redundancy as it did not wish to pay the sums stipulated in Section 40 of the Employment Act. The Respondent denied the allegation of redundancy and Mr. Rupert was emphatic that no redundancy had taken place, though he admitted that press release by IPSOS “*New Way*” published in Paris on 15<sup>th</sup> January 2015 was true. Mr. Rupert admitted that the “*New Way*” was launched in January 2014 and the Claimant was terminated in 15<sup>th</sup> October 2014.

40. Counsel submitted that reliance on the advertisement for the position of the Chief Finance Officer for IPSOS Pan Africa was intended to hoodwink the Court that there was no redundancy. It was Counsel’s contention that since the position was never filled after the Claimant left, he was terminated on account of redundancy and the Court should so find.

### **Infringement of Constitutional rights**

41. Counsel submitted that the treatment Mr Rupert and Mr. Olivier meted on the Claimant on the afternoon and evening of 15<sup>th</sup> October 2014 infringed on his constitutional rights, that he was blocked from entering his office, was subjected to verbal insults that he should get out of the premises and that Mr Olivier counter checked every document the Claimant identified as personal, logged him out of the computer system and emails on the office phone had been deleted and the Claimant had to summon his Counsel. That Mr. Rupert and Mr. Olivier kept the Claimant in the office until after midnight. That Mr. Rupert confirmed the timings on cross examination. It was further submitted that the events of the afternoon of 15<sup>th</sup> October 2014 violated the Claimant’s right to human dignity enshrined in Article 28 of the Constitution of Kenya, 2010 right to privacy under Article 31 and right to fair labour practices under Article 41. Finally, Counsel submitted that the Claimant was discriminated and paraphrased Section 5(3) of the Employment Act, 2007.

### **Reliefs prayed for**

#### **(i) Interest at Court rates on the 3 months’ pay.**

42. Counsel submitted that since the termination letter dated 15<sup>th</sup> October 2014 gave the Claimant three months’ written notice due to expire on 14<sup>th</sup> January 2015 and the Claimant was not required to work for the three months (*garden leave*) the Claimant deserved interest on the amount paid since the concept of “*garden leave*” and payment in lieu of notice were different. Counsel invoked Section 36 of the Employment Act in support that the provision required the party terminating the contract of employment to pay for the notice period and should not be paid when the duration lapses. Counsel submitted that employees continued calling the Claimant on work related issues during the three months, that the Claimant remained an employee until 14<sup>th</sup> January 2015 and is thus entitled to interest amount of Kshs.143,100.

#### **(ii) Unpaid 3 months from the 6 months’ termination notice**

43. Counsel submitted that Clause 10.1 of the contract of employment between the Claimant and the Steadman Group Limited (the Respondent’s Predecessor) dated 1<sup>st</sup> July 2008 provided that the Claimant was entitled to a 6 months’ termination notice. That Clause 7(1) of the Executive Employment Agreement dated 18<sup>th</sup> December 2012 was a nullity since it purported to reduce the termination notice from 6 to 3 months. That the Respondent had promised employees at the time of acquisition of the predecessor that their terms would not be varied to their detriment, thus the 6 months’ termination notice survived the 2008 agreement and because the Respondent had already paid for 3 months, the Claimant was entitled to the balance of 3 months amounting to Kshs.4,770,000.

#### **(iii) Compensation for unfair termination**

44. Counsel submitted that since the Claimant’s termination contravened Sections 35(5), 36, 40, 41, 43, 44 and 47 of the Employment Act, 2007 and was therefore unfair, the Claimant was entitled to the remedies in Section 49 of the Employment Act and relied on the Court of Appeal decision **Kenfreight (EA) Ltd v Benson K. Nguti (2015) eKLR** where the Court held that termination in accordance with terms of the contract upon giving the prescribed notice or payment in lieu of notice was a right independent of the statutory right under which valid reasons must be given, an employee heard in his defence and strict procedure followed, that an employer can elect to terminate an employee’s employment either under contractual terms or under statutory provision, that an employer who invokes the contract of service

need not assign any reasons or justification for termination.

45. The Court found that the termination was unfair, a decision the Supreme Court upheld in **Kenfreight (EA) Ltd v Benson K. Nguti (2019) eKLR**. Counsel relied on the two decisions exclusively to justify the claim for compensation for unfair termination amounting to Kshs.19,080,000.

#### **(iv) Non-compete payment**

46. Counsel submitted that since the termination was without cause as defined in Clause 6(b) of the Executive Employment Agreement dated 18<sup>th</sup> December 2012 the Claimant was entitled to non-compete payments, that the Respondent's choice for election was limited to the time of making payments, not more than 12 months or less than 6 months, that by the time the Respondent's Counsel notified the Claimant that the clause would no longer apply, 6 months had already passed and the Claimant is entitled to non-compete payments. No authority was relied upon to urge the payment.

#### **(v) Redundancy Payments**

47. Counsel submitted that since there was a restructuring christened the "New Way" and the advertisement for the position the Claimant left vacant was fraudulent as it was intended to hoodwink the Court and the position was never filled as Mr. Rupert confirmed on cross examination, and the Claimant had provided termination letter of one Mr. Watson and Alex who were terminated on alleged redundancy in April 2015, coupled with the Respondent's internal memo to staff dated 1<sup>st</sup> April 2015, the Claimant was entitled to severance pay for the 13 years he worked for the Respondent amounting to Kshs.20,670,000.

#### **(vi) Director's Compensation**

48. Counsel submitted that since the Claimant was a Director of 5 affiliates of IPSOS from diverse dates in 2011 and had been properly appointed Director of the affiliates in Uganda, Ghana, Nigeria, Tanzania and Kenya, and was not paid for the 4 years he served, he was entitled to payment at the rate of USD 1,000 per year amounting to USD 20,000. Reliance was made on the case of R. Simeza, an Advocate who served as a Director of the Zambian subsidiary of IPSOS was paid K46, 400,000 net of value added tax for directorship for 8 years.

49. Counsel also relied on the proforma invoice from **Ms Simeza Sangwa & Associates and the Court of Appeal decision in Kenfreight (EA) Ltd v Benson K. Nguti (2019) eKLR** for the proposition that custom and practice may be implied in an employment contract if fair, reasonable, notorious and certain. Counsel submitted that the ex gratia awarded by the Court of Appeal in this case was upheld by the Supreme Court.

#### **(vii) Leave Pay**

50. Counsel submitted that although the Claimant was entitled to 136 leave days, he was only paid for 10 days leaving a balance of 126 days and the Respondent had not challenged the Claimant's computation but had relied on the Human Resource Policy that carrying forward of leave days was not allowed. According to Counsel, leave days is a statutory entitlement under Section 28 of the Employment Act and cannot be taken away by contract or Human Resource Policies that the position taken by the Respondent would deny employees, their leave entitlement. Counsel further submitted that during cross examination, Mr. Rupert was at pains to explain the claim that the Respondent did not allow carrying forward of leave days in the face of a letter dated 1<sup>st</sup> April 2015 to one Mr Watson who had accumulated **38 leave days** as confirmed by Director, Human Resources and undertaking to pay him for 22 days.

51. Reference was also made to email communication between the Claimant and the Director Human Resources where the Claimant protested payment for 10 days when he had accumulated more days that the Director Human Resources did to dispute the leave days but promised to forward the issue to Mr. Rupert, the EMEA Legal Counsel for IPSOS.

52. That since the Claimant's compensation of leave days is not disputed by the Respondent, the same should be compensated for as prayed.

#### **(viii) Declaration that the Claimant's constitutional rights have been infringed**

53. Counsel relied on preceding paragraphs to urge the Court to make the declaration sought.

#### **(ix) General Damages for Defamation**

54. Counsel relied on the decision by Rika J. in **Vaqvi Syed Qamara v Paramount Bank & Attorney General (2015) eKLR** where the Learned Judge awarded Kshs.2,500,000 for defamation on the premise that where an employer publicises or causes to be published statements which stigmatize the employee, defamation is deemed to have taken place. It was further submitted that because the Respondent gave no reason for terminating the Claimant and had to be accompanied by his Lawyer on 16<sup>th</sup> October 2014 to retrieve personal effects this created the impression that the Claimant could have committed a serious offence to warrant the treatment, that the negative coverage by Kenya Bwala posted on 17<sup>th</sup> October 2014 entitled "*IPSOS Synovate CFO sacked and Escorted out of office*" created the impression of wrongdoing to warrant investigation. That the publication made reference to fraud and financial improprieties which affected the Claimant's employability since he is an Accountant, that an award of Kshs.15,000,00 would be appropriate.

#### **(x) Compensation – Kshs.5,000,000**

55. Compensation for infringement of constitutional rights for the sum of Kshs.5,000,000. Counsel relied on the decision of Nduma J. in

**VMK v CVEA (2013) eKLR** in urging the Court to award the sum of Kshs.5,000,000.

56. Declaration that that Claimant remains Director in IPSOS Market Research Ltd – Nigeria, Ipsos Tanzania Limited, IPSOS Ltd Uganda, IPSOS Limited Kenya and IPSOS Ltd Ghana.

57. Counsel submitted that since attempts by Mr Rupert and Mr. Olivier to have the Claimant resign from the directorship of IPSOS affiliated companies fell through, and he now is willing to resign as provided by law upon computation for his termination by the Respondent, he is entitled to the declaration

58. In conclusion, Counsel submitted that the Claimant was unfairly terminated in that no prior notice was served and he was not afforded a hearing and no reason was given for the termination.

59. That Mr. Rupert and Mr. Olivier treated the Claimant in a humiliating and disgraceful manner in hounding him out of the office in the middle of the night which crated a negative impression in the minds of employees yet the 2014 performance review of the Claimant characterised him as astute, accurate, conscientious, high integrity, hardworking, good relationship within Africa Team and region, respected by business partners and internal stakeholders and strong ethics, committed, loyal, focused on the business, maturity and so forth.

60. That the Claimant's last salary review was effected on 30<sup>th</sup> July 2014 in acknowledgment and appreciation of his hardwork and contribution to IPSOS Limited in 2014. How does a person with such illustrious career as the Claimant get chased away in the middle of the night like a thief ...? Counsel attributed this to high level malice by the Respondent and urged the Court to award all prayers in the memorandum of claim.

### **RESPONDENTS' SUBMISSIONS**

61. The Respondent submitted on the following five issues –

#### **(i) Was the Claimant an employee of the Respondent?**

62. On this issue, the Respondent submitted that it was common ground that there was a contract of service between the Claimant and the Respondent and its predecessors. The last employment agreement between the parties was signed on 18<sup>th</sup> December 2012. This agreement was backdated to 26<sup>th</sup> November 2001 when the Claimant was first employed. The agreement made provision for termination and its consequences.

#### **(ii) Whether the Claimant's termination on 15<sup>th</sup> October 2014 was lawful or fair**

63. On compliance with Section 45 of the Employment Act, 2007, the Respondent submitted that the Claimant's termination was not only lawful but fair because the Claimant was aware of the reason for termination since he had been called and notified about the issues necessitating the visit by Olivier Champourier and Mr. Rupert Van Hullen. That the Claimant was well aware of the visit and its purposes. It was further submitted that the visiting officials and the Claimant had a whole day's meeting on 15<sup>th</sup> October 2014 whose subject matter had been shared and was discussed. That the Claimant did not provide the details of the issues discussed on 15<sup>th</sup> October 2014.

64. It was further submitted that the during the meeting of 14<sup>th</sup> October 2014 substantial irregularities were discovered which implicated the Claimant's performance leading to a loss of Kshs.204,148,000 for the wider group of the Pan Africa region for which the Claimant was the Chief Finance Officer.

65. As regard the meeting of 15<sup>th</sup> October 2014, it was submitted that the Claimant had testified that he spent the time in the office discussing issues germane to performance and was available to explain any issue during the meeting.

66. That later in the afternoon when requested to resign from the Company and the directorship, he was unhappy and uncooperative after which the Claimant summoned his lawyer. In addition, Rupert Van Hullen admitted that he had prepared resignation letters for the Claimant's signature but the Claimant refused to do so contrary to the terms of employment.

67. On the issue of bonus the Respondent submitted that the documents on record did not exonerate the Claimant from blame since he wrote an email seeking approval of payment and finally that the payment implied blame worthiness and negligence and/or incompetency/performance on the part of the Claimant.

#### **(iii) Was the Claimant terminated by the Respondent or a result of restructuring being carried out by the Company?**

68. On the issue the Respondent submitted that Mr. Rupert Van Hullen had in his statement at paragraph 8, 10 and 15 indicated that the termination letter dated 15<sup>th</sup> October 2014 was issued in accordance with Section 7(1)(iv) of the Executive Employment Agreement and that the Claimant was indeed aware and had been informed of the financial issues resulting in his termination. That the letter granted the Claimant – 3 months' termination notice as per Section 7(1)(iv) of the Agreement of Employment which spelt out his terms of employment. Therefore, the termination was not a redundancy.

69. It was further submitted that Mr. Rupert Van Hullen had categorically stated that the allegations in the claim on the occurrences on 15<sup>th</sup> October 2014 was not a true reflection of the actual events and were intended to cast negative aspersions on the Respondent in an attempt to mislead the Court.

70. Finally, it was submitted that Mr. Rupert Van Hullen denied that there was any restructuring and the lack of a replacement of the Claimant was due to lack of suitable applicants for the position. That there was no redundancy as claimed by the Claimant.

**(iv) Were the constitutional rights of the Claimant infringed in the process of the Claimant being ejected from the office?**

71. The Respondent submitted that its witness Mr. Rupert confirmed in his statement and oral evidence that the Respondent did not discriminate amongst its employees and no such incident had taken place in its operation.

72. It was further submitted that the allegations on violation of fundamental rights by the Claimant had no basis and no direct evidence had been adduced in Court. That the allegations did not fall under Section 5 of the Employment Act or the criteria under Articles 27, 28, 29, 31, 34, 41 and 47 of the Constitution of Kenya, 2010 and any factual basis.

73. That the allegations germane to human dignity, privacy humiliation and other employment rights had not been proved and finally that the terms of employment required the Claimant to comply whenever notified of his termination.

74. On defamation the Respondent made no specific submission.

75. On whether the Claimant was entitled to the reliefs sought, the Respondent submitted as follows –

(a) (i) Interest for 3 months of KShs.143,100 lacked legal basis, was fictitious and should be dismissed.

(ii) Unpaid 3 months' termination notice lacked factual basis since the Claimant was paid for 3 months as per the notice and should be dismissed. That the Claimant rejected a one month's salary offer.

(iii) 12 months' salary compensation was not payable because the Claimant was made aware of the financial issues in question and the Claimant had full day's meeting with Mr. Rupert and Olivier and was accordingly accorded time to make representations on the issues, the valid reason for termination in consonance with Section 43 of the Employment Act, 2007 and ought to be dismissed. The Respondent relies on the decision in **Amos Kitave Kivite v Kenya Revenue Authority (2020) eKLR**, where the Claimant's case was dismissed because the termination was neither unfair nor unlawful as prayed.

(iv) On non-compete payment, the Respondent contended that the Respondent did not enforce the condition and permitted the Claimant to work whenever he wished. That the claim intended to unjustly enrich the Claimant and should be dismissed.

(v) On payment for redundancy, Counsel submitted that the amount claimed was not payable because the Claimant was terminated as per the employment contract. That the insinuation that the Claimant was laid off under a redundancy lacked factual basis and ought to be dismissed.

(vi) On Director's compensation, Counsel submitted that the sum claimed was not payable because the directorships were held by virtue of the Claimant being the Chief Finance Officer of the Pan Africa region and did not attract separate remuneration in his case and should be dismissed.

(vii) On leave pay, Counsel submitted that days accruing before the Employment Act, 2007 should not be considered. That the Claimant adduced no evidence of authority to carry forward leave days and the claim should be dismissed. It was further submitted that that Claimant was offered 31 days less the 10 days paid but declined.

(b) The declaration sought for infringement of constitutional rights was not proved as neither the rights infringed upon have been spelt out nor the manner of infringement and ought to be dismissed for want of particulars.

(c) On general damages for defamation, Counsel submitted that the claim was untenable because the defamation alleged was neither spelt out nor proved, a mere allegation ripe for dismissal.

(d) That declaration that the Claimant validly remains a Director of IPSOS is not legally sound since the position was held by virtue of the Claimant's employment and should be dismissed.

(e) That interest on (a), (c) and (d) was not tenable and

lacked merit.

(f) That costs of the suit be paid by the Claimant.

(g) That the whole suit be dismissed with costs.

**ANALYSIS AND DETERMINATION**

76. I have carefully considered the pleadings, evidence on record submissions and the law. It is not dispute that the Claimant was employed by the Respondent from 26<sup>th</sup> November 2001 to 15<sup>th</sup> October 2014 when his services were abruptly terminated in accordance with the terms of the contract of employment dated 18<sup>th</sup> December 2012. The issues for determination are: -

- (a) Whether the Claimant's termination was unfair and unlawful;
- (b) Whether the Claimant's constitutional rights were infringed
- (c) Whether the Claimant was defamed
- (d) Whether the Claimant was terminated through restructuring
- (e) Whether the Claimant remained a Director of IPSOS and its affiliates after termination on 15<sup>th</sup> October 2014;
- (f) Whether the Claimant is entitled to the reliefs sought.

**(a) Whether the termination was unfair and unlawful**

77. Section 45(2) of the Employment Act, 2007 provides that termination of an employee's contract of services is unfair if the employer fails to prove that the termination was founded on a valid and fair reason(s) germane to the employee's conduct, capacity or compatibility or on the employee's operational requirements and that a fair procedure was followed. In **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** the Court held that:

*“ ... for a termination to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for termination while procedural fairness address the procedure adopted by the employer to effect the termination.”*

78. A similar holding was made in **Pamela Nerima Lutta v Mumias Sugar Company Ltd [2017] eKLR**.

79. Relatedly, in **National Bank of Kenya Ltd v Anthony John Njue [2019] eKLR**, the Court of Appeal cited with approval observation by the Court of first instance in **Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR**, on the effect of Section 45. Section 41 of the Employment Act sets out the procedural parameters to be complied with for purposes of ensuring that the termination of an employee is fair. The Section provides –

**41. Notification and hearing before termination on grounds of misconduct**

**(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.**

80. In this case, it is not contested that the Respondent issued a termination notice to the Claimant on the afternoon of 15<sup>th</sup> October 2014, and the notice gave the Claimant a three months' notice as provided by Clause 7(a)(iv) of the Executive Employment Agreement dated 18<sup>th</sup> December 2012. The letter gave no reason for termination as none is required where either party to an employment contract invokes the terms of the contract. The letter of termination, however informed the Claimant that he would not be required to work during the period of notice (garden leave) but would be remunerated in the usual way. In effect, the Claimant remained an employee of the Respondent until 14<sup>th</sup> January 2015 when the three months' notice period lapsed. Further, the letter required the Claimant to immediately surrender all property of the Company including mobile phone, laptop, bank account access tokens and required him to resign from the directorship of the company as well as a Director of IPSOS Ltd in Ghana and any other company that was owned or controlled by IPSOS South Africa. Letters of resignation from directorships were enclosed. The Claimant accepted the letter of termination but demanded to be told the reason for the action but none was forthcoming. It was only after the Claimant had written to the Respondent on his dues that the Respondent hinted that there were reasons for termination germane to the Claimant's performance. And true to its word, in its response to the Claimant's memorandum of claim, dated 5<sup>th</sup> April 2015 and filed on 6<sup>th</sup> April 2015 the Respondent catalogued seven (7) failures attributed to the Claimant and which the Respondent alleged were within the Claimant's knowledge on account of extensive correspondence and as explained to him on the evening of 15<sup>th</sup> October 2014.

81. In an attempt to justify the Claimant's termination, the Respondent relied on a catalogue of the Claimant's failures yet the letter of termination identified none. It is unclear why the Respondent did not set out the alleged failures in the letter of termination. The guiding principles on the choice of termination were formulated by the Court of Appeal in **Kenfreight (EA) Ltd v Benson K. Nguti [2017] eKLR** where the Court observed that –

*“ ... an employer can elect to terminate an employee's employment either under contractual terms or under statutory provisions; that the appellant elected the former even though there were sufficient grounds to invoke the latter and summarily dismissed the respondent; that the appellant having invoked the contract of service did not have to assign any reason or justification for the termination.”*

82. If an employer elects to terminate an employee under statutory provisions, it is bound to provide valid reasons for a termination and the provisions of Section 41 of the Employment Act must be complied with in totality.

83. In this case, the Respondent elected the contract of service and was therefore not bound to provide any reason for termination. However, on remedies, the Supreme Court was emphatic in **Kenfreight (EA) Ltd v Benson K. Nguti [2019] eKLR**

*“... it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies.”*

This is the most authoritative articulation of the law on termination of employment where a party invokes the terms of the contract as opposed to statutory provisions.

84. In the instant case, the Respondent relied on Clause 7(a)(iv) of the contract of employment dated 18<sup>th</sup> December 2012 but subsequently sought to introduce reasons for the termination and rely on them as the grounds for terminating the Claimant. The Respondent appears to suggest that in addition to relying on the terms of the contract between itself and the Claimant, it also invoked the statutory route to justify the termination as mandated by Section 43 of the Act and Section 45 reiterated under. In which case it behoves the Court to determine whether the statutory framework on termination was complied with.

85. As adverted to above, Sections 41 and 45 of the Employment Act, 2007 prescribe the procedural and substantive parameters to be followed if a termination is to be deemed to have been fair. The reasons for termination must not only be valid but fair. The Respondent maintained that the Claimant was aware of the failures catalogued in page 4 – 5 of the response to the memorandum of claim, Mr. Rupert the Respondent's witness emphasised this point when he gave evidence in Court that the failures were explained to the Claimant during the meeting on the afternoon of 15<sup>th</sup> October 2014. Whereas this may have been intended to explain why the meeting took inordinately long, the Respondent did not lead any evidence to prove the same. The Claimant's uncontroverted testimony is that he did not once receive a notice to show cause or any other communication requiring him explain the alleged failures cited by the Respondent. He testified that before 5 pm on the material day he worked in his office, though both Mr. Rupert and Olivier would come in for information or documentation regarding on the Respondent. He confirmed that he was summoned to the Boardroom after 5.00 pm and Mr. Rupert confirmed the timing of the meeting. The Respondent provided no evidence or material to support of the allegation that the failures were within the Claimant's knowledge. On cross examination, the witness stated that the Respondent's auditors had raised the issues with the Claimant but documentation of the alleged communication to the Claimant was provided. The accounts of the Respondent for 2013 and 2014 were part of the Respondent's bundle of documents. For the financial statements for the year ended 31<sup>st</sup> December 2013, the Directors of the Respondent reported a net loss Kshs.18,612,949 and did not recommend payment of dividend. The financial statements were audited by Independent Auditors M/s BDO East Africa, Kenya. In their report to the members of the Respondent, the auditors observed as follows: -

*“We have audited the accompanying financial statements of IPSOS Ltd, which comprise the statement of financial position as at 31<sup>st</sup> December 2013 ... Our responsibility is to express an opinion on these financial statements based on our audit ... we believe the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.”*

### **Opinion**

*“On our opinion, the financial statements present fairly in all material respects, the financial position of IPSOS Limited as at 31<sup>st</sup> December 2013 and its financial performance and its cash flows, for the year that ended in accordance with International Financial Reporting Standards and the requirements of the Kenyan Companies Act.”*

86. The Independent auditors gave the Respondent's financial statement for the year 2013 an unqualified opinion, the best an organization can get from auditors. The financial statements for the year ended 31<sup>st</sup> December 2014 attached by the Respondent are neither signed by the Directors nor the Independent Auditor. The Directors reported a loss of Kshs.115,056,809 and did not recommend payment of dividend. The auditor's report is also unqualified.

87. It is unclear where the Respondent's witness obtained the figure of Kshs.201,148.00 as loss to the company which he wholly attributed to the Claimant's failures.

88. External or independent auditors typically raise their issues/matters in their report to the client and none was raised in the financial statements of IPSOS for the year ended in 2013 and 2014. In addition, no other communication was provided by the Respondent to establish that the issues were raised by the Auditor.

89. Consequently, the assertion that the alleged failures had been communicated to the Claimant before the meeting on 15<sup>th</sup> October 2014 remain unproven. Similarly the Respondent, as Convenor of the meeting of 15<sup>th</sup> October 2014 provided no material on the agenda of the meeting or minutes to establish what was deliberated upon and the decisions made. The Claimant's testimony that he was summoned to the boardroom after 5.00 pm where Mr. Rupert and Mr. Olivier demanded his immediate resignation and on refusal Mr Rupert and Olivier handed him a letter of termination with draft letters on resignation from the directorships of IPSOS Ltd and its affiliated companies remains uncontroverted.

90. Relatedly, the Claimant addressed all the allegations in his evidence and submissions. He explained the challenges the organisation was facing on revenue recognition when the Respondent implemented the Symphony system, which required revenue to be recognised before contracts were signed which led to reversals if negotiations with a client were unsuccessful.

91. Similarly, the Claimant responded to the issues of bonus that he only received the 13<sup>th</sup> salary which was contractual, a fact the

Respondent's witness did not contest. That he reported to senior officers based in Paris, not the Respondent's shareholders and that the delay in finalizing accounts was occasioned by resignation of the Chief Finance Officer of IPSOS, Kenya. He also explained the allegation on fraudulent bookings in Tanzania and Uganda as alleged.

92. On the loss made by the Respondent, the Respondent's witness provided no evidence on how it arose and the nexus between the loss and the Claimant. The Respondent's witness whom the Court found truthful made generalized attributions of culpability on the Claimant without details. The fact that the witness could not respond to finance and accounting questions such as recognition of revenue, book loss and actual loss and others left the allegations unexplained in the face of the Claimant's explanation. Regrettably, virtually all the failures the Claimant was accused of related to accounting or financial processes.

93. Since the Respondent provided no evidence of any phone call to the Claimant on the alleged failures, or documentation, communicating the litany of failures to the Claimant or record of the proceedings of the meeting of 15<sup>th</sup> October 2014, or invitation to the meeting, this Court finds that the alleged failures relied upon by the Respondent as the reason for his termination were an afterthought and thus invalid and unfair to the Claimant contrary to Section 45 of the Employment Act, 2007.

94. Similarly, because the allegations were not communicated to the Claimant for a response and/or representations as required by Section 41 of the Employment Act, 2007 and the Respondent on the failures, no evidence that it heard or considered the Claimant's representations, before termination. It is the finding of this Court that the Claimant's termination did not pass the fairness test as explained in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.

95. Interestingly, all the failures relied upon by the Respondent implicated the Claimant's performance for some time prior to termination on 15<sup>th</sup> October 2014 which contrasts sharply with his performance evaluation results for 2013 which characterised him as astute, accurate, conscientious, high integrity, hard working, good relationship with Africa team and region, respected by business, partners and internal stakeholders, strong ethics, loyal and mature. This was confirmed by the Respondent's witness on cross examination Mr. Olivier's communication to staff dated 15<sup>th</sup> October 2014 which stated in part:

*“It is with regret that we have to inform you that as of 15<sup>th</sup> January 2015, Chief Finance Officer Naftali Mwangi (Claimant) will be leaving the IPSOS family. Naftali joined the Steadman Group 11 years ago as an Accountant and has risen through the ranks through dedication and hard work...”*

96. In sum the Respondent has on a balance of probabilities not discharged its burden of proof under Sections 41, 43(2) and 45 of the Employment Act.

97. The Court finds and holds that the Claimant's termination on the evening of 15<sup>th</sup> October 2014 was unfair and unlawful.

#### **Whether the Claimant's Constitutional rights were infringed**

98. The Claimant prayed for a declaration that his constitutional rights were infringed and compensation at Kshs.5,000,000. In **Anarita Karimi Njeru v The Republic [1976 – 1980] KLR** it was held *inter alia* that a party seeking redress for alleged constitutional violations against its rights is required to clearly set out the alleged infringements as well as the constitutional provisions alleged to have been breached and the manner in which the infringement took place. The Claimant alleged that the Respondent violated Articles 25, 27, 41, 47 and 50 of the Constitution of Kenya, 2010.

99. According to the Claimant, infringements took place on the evening of 15<sup>th</sup> October 2014 when he was summoned to the Boardroom and assumed the following forms –

- (i) Being called upon to resign from the Respondent without prior notice;
- (ii) Being compelled to sign directorship resignation forms and affidavit;
- (iii) Mr. Rupert and Mr. Olivier hovering around him as he cleared and retrieved personal documents;
- (iv) Being at the workplace up at midnight;
- (v) Humiliation by the two officers of the Respondent;
- (vi) The Human Resource Department was not involved;
- (vii) Verbal insults;
- (viii) Mr. Olivier confirming that only documents of a personal nature were retrieved;
- (ix) Being logged out of the Respondent's email system;
- (x) Negative publication on social media;
- (xi) Being hounded out of the office maliciously;

(xii) Was not accorded the right to be heard;

(xiii) Was accorded limited time to clear on 16<sup>th</sup> October 2014.

100. The Respondent's witness (Mr. Rupert) denied that allegations but admitted that the meeting took inordinately long owing to disagreements because the Claimant did not want to resign. It was the Claimant's testimony that his Lawyer arrived around 7.00 pm and was therefore privy to the bulk of the discussions, disagreements and the humiliation the Claimant allegedly received, but did not give evidence to buttress the Claimant's allegations on the alleged infringement of constitutional rights. In addition, the Claimant testified that some fellow colleagues attempted in vain to persuade Mr. Rupert and Mr. Olivier to stop treating him in an inhumane, humiliating and indignified manner. None of these colleagues was invited as a witness to corroborate the mistreatment. Moreover, the Claimant was emphatic in his oral testimony that before his Counsel arrived, it was only Mr. Rupert and Mr. Oliver who were present.

101. The foregoing catalogue of alleged violations of the Constitution were not supported by any material, for instance, the nature of character of the verbal insults was not provided nor the personal documents the Claimant had in the office or office email account. The conduct complained of show that Mr. Rupert and Mr. Olivier treated the Claimant in a shabby, humiliating and unjustifiable manner on 15<sup>th</sup> October 2014 and do not in the Court's view, attain the threshold of infringements of constitutional rights. On being kept at the work place until after midnight, the Claimant did not allege that he was falsely imprisoned nor did his Counsel state so. However the Court appreciates that it is not a fair labour practice for an employer to keep an employee, at the workplace for long hours unless by mutual consent. Similarly, some of the alleged violations are addressed under other sub-headings. Reliance was made on the decision in **VMK v CUEA [2013] eKLR** where Nduma J. awarded Kshs.5,000,000 to the Claimant for breach of her constitutional rights by the employer. The Claimant had been denied permanent employment because of her HIV status. The Claimant did not explain how the decision applies to his claim. Accordingly the Court finds and holds that the Claimant did not discharge the burden of proof that his constitutional rights were violated or infringed.

### **Whether the Claimant was defamed**

102. **Winfield and Jolowicz on Torts, 16<sup>th</sup> Edition; 2002 on page 404** defines defamation as the publication of a statement or representation which tends to bring a person into hatred, contempt and ridicule and tends to lower the person's image in the estimation of right thinking members of Society.

103. Whether or not a representation or statement is defamatory depends on whether it:

(i) Is defamatory in the ordinary or natural meaning or by innuendo;

(ii) Was published or made known to at least one other person and

(iii) Makes reference to the person directly or indirectly.

104. In this case, the statements published by "*Kenya bwala*" identified the Claimant by name and had the potential to lower his image in the estimation of right thinking members of the society. The statements read "*IPSOS Synovate CFO SACKED and Escorted Out of office*" published on 17<sup>th</sup> October 2014. However, the Claimant did establish that the statements were published by the Respondent or at its behest or in any other way attribute it to the Respondent. Second, the claim was vehemently denied by the Respondent's witness on cross examination. Thirdly, since the Publisher was not joined in the proceedings, the source of the publication could not be established.

105. Reliance was made on the decision in **Vaqvi Syed Qamara v Paramount Bank Ltd [2015] eKLR** where Rika J. awarded Kshs.2,500,000 for defamation on the ground that "*the manner of dismissal and negative publicity attached to the Claimant had the potential to damage is employability*".

106. The Claimant, however, made no mention of the appeal in **Paramount Bank Limited v Vaqvi Syed Qamara & another [2017] eKLR** where the Court of Appeal set aside the Kshs.2,500,000 awarded in general damages for defamation on the ground that neither the authenticity of the statements nor their libellous character had been established.

### **Whether the Claimant was terminated through restructuring/redundancy**

107. Although the Employment Act, 2007 does not define the term restructuring or re-organization and such related terms, courts of law have variously discerned redundancy from the circumstances of particular cases even where the employer has not used the term. Be that as it may, the party that has pleaded redundancy as the reasons for termination must prove it as he who alleges must prove. It is trite law that where termination is contested and alleged to be unfair, the burden of proving that unfairness rests on the employee while the burden of justifying the grounds for termination rests with the employer, as was held in **Kenya Airways Ltd Aviation and Allied Workers Union Kenya & 3 Others [2013] eKLR**.

108. The Claimant relies on the so called "*New Way*" by the Respondent. The Claimant alleges that various press releases show that at IPSOS Global had made a decision to restructure its business operations to enhance profitability and simplify operation procedures. He relied on press releases dated January 2015 entitled IPSOS "*New Way*". The Chairman's speech entitled "*A New Way for IPSOS*" (By Didier Truchot) "*financial performance*" by Lawrence Stoclet dated January 2015 "*Highlight 2014*" *IPSOS 2014 Reference Document and Financial Report*". In a nutshell, the "*New Way*" implied technological tools resource organisation and optimisation and creation of new entities. According to the Chairman and CEO of IPSOS, the New Way was intended to transform the business by simplifying in organization, improving its operating performance and its ability operate a lower cost and with higher quality. In his report, dated January 2015, the Deputy CEO and Chief Finance Officer Lawrence Stoclet lamented that 2014 "*was of course disappointing for both us and the market*". Neither the Chairman of IPSOS nor the Deputy CEO and Chief Finance Officer provided any specifics on how the "*New Way*"

would be implemented or its impact on staff.

109. The Claimant alleged that because the Company was not doing well, the purpose of the “New Way” was to enhance its profitability through restructuring, that after his termination IPSOS reorganised its business operations in Africa to two clusters East and West Africa as per the internal memo dated 1<sup>st</sup> April 2015, that the person likely to be appointed to his former position would work under a different company organizational structure. He alleged that his Former position was never filled and thus his termination was a redundancy in disguise. The Claimant produced two letters of persons whose employment was discontinued on 1<sup>st</sup> April 2015 and were paid severance pay among other dues provided for under Section 41 of the Employment Act, 2007.

110. The allegations of redundancy was vehemently denied by the Respondent. Its witness confirmed on cross examination that the Claimant’s position was advertised and produced an email to that effect, but the Respondent did not find a suitable candidate. The Respondent further confirmed that some reorganisation was effected in April 2015 despite the fact that the idea was conceptualised in January 2014.

111. The Claimant did not lead any evidence to prove that there was restructuring in the Nairobi office and why he was declared redundant as alleged seven months before the alleged re-organization was effected and why only him in October 2014. From the evidence on record, the Claimant has not demonstrated that he was terminated on account of redundancy.

#### **Whether the Claimant validly remains a Director of IPSOS affiliated companies in Nigeria, Tanzania, Uganda Kenya and Ghana.**

112. The Claimant sought a declaration that he validly remains a Director of the five companies and claimed compensation amounting to USD 20,000. The Claimant testified that he was appointed a Director of five companies affiliated with IPSOS and the appointments were remunerative but was not paid for the duration of 4 years he served and is claiming USD 20,000 at USD 1,000 per company per year. He relied on the Respondent’s resolution and the documentation on appointment. The Respondent acknowledged that the Claimant was appointed and served as a Director of the companies in question but denied that he was entitled to any remuneration for the directorship.

113. To buttress the case for remuneration, the Claimant relied on a copy of a proforma invoice from Simeza, Sangwa and Associates Advocates dated 31<sup>st</sup> August 2012 and alleged that Mr. Simeza, who was a Director of Steadman Research, Zambia, a subsidiary of the Respondent was paid R46,400,000 less Value Added Tax of 16%. The invoice was drawn in the name of a law firm and evidence of payment was not provided.

114. Needless to emphasise, remuneration for directorship, is governed by the instrument of appointment or internal policies of the organization. The Claimant provided no documentary evidence that the directorships were remunerative. Reliance on a proforma invoice from a third party is not sufficient evidence to establish that a person’s entitlement to remuneration. It was not established that Mr. Simeza was, in addition to being a Director of Steadman Research, Zambia an employee as well and had no letter of appointment with a provision for remuneration. The Claimant led no evidence to prove that Mr. Simeza was also an employee of Steadman Research, Zambia.

115. Similarly, the Respondent’s witness testified that directorship for employees at IPSOS were not remunerative and were anchored on the position held in the Company and lapsed on cessation of employment. He told the Court that the directorships were remunerated together with the monthly salary. He informed the Court that he was a Director of 26 IPSOS affiliated companies at no extra remuneration.

116. More significantly paragraph 4.1 of the Service Agreement between the Steadman Group Ltd and the Claimant dated 1<sup>st</sup> July 2008 provided as follows: -

*“Your salary will be Kenya shillings 6,060,000 per annum subject to deduction of all applicable taxes and national insurance or social security contributions. You will be paid by equal monthly instalments in areas by credit ... Your salary is deemed to include any fees receivable for holding any office in the company and/or any associated company.”*

117. In addition, paragraph 1(d) of the Executive Employment Agreement between Synnovate Kenya Limited and the Claimant dated 18<sup>th</sup> December 2012 provides that:

*“If requested by the Company you agree to serve, without additional consideration as an officer, Director or member of any committee of the Board of directors of the company or of one or more affiliate companies as the company may direct. You agree to resign immediately from any such positions at any time if requested by the company or in the event that your employment terminates.”*

118. As discernible from the two agreements executed by the Claimant and the Respondent, the directorships, held by the Claimant in the Respondent and its affiliated companies were not anticipated to attract additional remuneration.

119. From the evidence on record, the Claimant has not demonstrated that he was entitled to additional remuneration for the five (5) directorship held nor has he shown how and why a declaration should issue that he remains a Director of the Companies even after the contract of service between him and the Respondent came to an end on 15<sup>th</sup> October 2014.

#### **Whether the Claimant is entitled to non-compete payment**

120. On non-compete payments, the Claimant alleges that because the Executive Employment Agreement dated 18<sup>th</sup> December 2012 contained a non-compete clause, and since he was terminated by the Respondent, the non-compete clause became operational. He avers that since he was terminated “without cause” and “for any other reason” as defined by Clause 7(b) of the Agreement, the non-compete clause

kicked in and he was entitled to payment as provided for any clause 6(a)(ii) of the Agreement) for not less than 6 months, no more than 12 months from the date of termination. The Claimant submitted that although the Respondent's advocate notified the Claimant that Clause 6(a)(ii) would not apply, the communication was made after 6 months had lapsed.

121. The Claimant urged the Court to award non-compete payment. Clause 6(b) and (c) of the Executive Employment Agreement of 18<sup>th</sup> December 2012 was to all intents and purposes a contract in restraint of trade. The Claimant cited no authority to reinforce the claim and did not allege that he remained jobless because of the restraint in the contract of service.

122. Section 2 of the contracts in Restraint of Trade Act provides that although a restraining clause does not render a contract invalid, courts have the power to declare the restraining clause or provision void if it is unreasonable to the parties and goes beyond protecting the restraining parties' interests and is injurious to public interest. The justification for this power is to promote competition in a free market economy. Each case is determined on the basis of the facts and prevailing circumstances.

123. In **Credit Reference Bureau Holdings Ltd v Steven Kunyihya [2017] eKLR** the Court observed that –

*“In order to be enforceable such restraint must seek to restrain the use of only that which is uniquely that employer's secret could not knowledge and skill which can be acquired by learning, experience or development in technology.”*

124. At common law, a contract restraint of trade is *prima facie* invalid unless reasonable as between the parties and not injurious to the public interest. (See **Nordenfelt v The Maxim Nordenfelt Guns & Ammunition Co. Ltd. [1894] AC 535** and **Petrofina (Great Britain) Ltd v Martin [1966] Ch. 146**).

125. In **Martha Wangari Kariuki v Muli Musyoka & Another [2001] eKLR**, the Court enforced a restraining clause involving a training bond where the Claimant had signed a training contract for Kshs.200,000 and covenanted not to leave the Respondent's employment within 2 years but LEFT earlier. The Respondent was award USD 1,562.50

as bond for 15 months.

126. On re-examination, the Claimant alleged that a former Managing Director for IPSOS Kenya was paid non-compete allowance but led no evidence to prove this allegation. The Respondent's witness on the other hand confirmed on cross examination that the Respondent had no objection to the Claimant joining any other employer after termination.

127. Finally, the Claimant on cross examination confirmed that although he stayed without work for 2 years *“I could get opportunities but the social media had published negative information about me akin to having stolen from the Company”*. Thus the Claimant remained jobless for reason other than honouring the non-compete clause. Based on the evidence on record, the Court is not persuaded that the Claimant has established a case for non-compete payment.

#### **Whether the Claimant is entitled to payment of 126 leave days**

128. The Claimant seeks compensation for 126 days of accrued leave since 2002. He avers that as per the letter of appointment dated 15<sup>th</sup> February 2002, he was entitled to 24 days' annual leave and even after promotion on 1<sup>st</sup> January 2008, the basic terms of employment including annual leave days remained the same. That from November 26<sup>th</sup> 2001 to 1<sup>st</sup> January 2008 he was only permitted to proceed on leave for 21 days annually. A completed leave application from for 2003 was provided. He claims a balance of 18 days for the 6 years. That the Human Resource Department had notified him that he had 92 leave days when he was leaving office on 15<sup>th</sup> October 2014, that he days were arrived at using 21 days per year. He further avers that he is entitled to 25 days' leave pursuant to the contract dated 1<sup>st</sup> July 2008 and thus had an extra 18 days from 1<sup>st</sup> July 2008 to 18<sup>th</sup> December 2012 when the last agreement was signed and which provided that the Claimant was entitled to 21 days leave per year.

129. He therefore claims that he had accumulated a total of 136 leave days and since the Respondent had paid for 10 days, 126 are outstanding for which he seeks Kshs.8,061,800. Other than the fact of having paid for 10 leave days, the Respondent adduced no helpful evidence on the outstanding leave days. On cross examination, the Respondent's witness stated that the Claimant had leave entitlement up to 15<sup>th</sup> October 2014 *“These days were paid for, I guess he stated. From 2014 he had not taken leave and I understand he was paid.”* He told the Court. He testified that according to the Respondent's calculations, and the contract of employment no due to the Claimant were outstanding.

130. On 28<sup>th</sup> January 2015, the Claimant wrote to the Respondent's Human Resource Department contesting the 10 leave days he had been paid for contending that he had more than 92 days calculated 21 days per year. The response by Violette Kihanya stated in part, *“I have forwarded this email detailing your concerns about final dues to our EMEA Legal Counsel (Mr. Rupert) and will wait to hear back on this matter so that I can revert appropriately.”*

131. The Claimant received no further communication on the issue. Noteworthy, the Respondent's Human Resource Department did not contest the Claimant's computation of leave days or provide a different number of days.

132. Is the Claimant entitled to 126 days? In total, the Claimant signed of four (4) contracts of service with the Respondent as follows –

(1) Letter of appointment dated 15<sup>th</sup> February 2002 which provided for 24 leave days per year effective 26<sup>th</sup> November 2001.

(2) Agreement dated 18<sup>th</sup> January 2008 which provided for

21 days per year, effective 1<sup>st</sup> December 2007.

(3) Agreement dated 1<sup>st</sup> July 2008 effective 1<sup>st</sup> July 2008 which provided for 25 days holiday with full pay each holiday year in addition to public holidays in Kenya (holiday year was 1<sup>st</sup> January to 31<sup>st</sup> December)

(4) Agreement dated 18<sup>th</sup> December 2012 effective 26<sup>th</sup> November 2012 which provided for 21 leave days per year.

133. The Claimant alleges that the 25 leave days per annum under the contract signed on 1<sup>st</sup> July 2008 survived the contract when the last agreement was signed on 18<sup>th</sup> December 2012. This allegation is not sustainable. In law, the moment parties to a written contract enter into a subsequent contract, the previous contract is discharged and the parties released from the obligations created by it. The relationship is henceforth governed by the terms of the new contract unless there is an express provision to the contrary. According to **R. W. Hodain in Law of Contract in East Africa, 2006 Edition at page 174**, the former contract between the parties is discharged by mutual agreement. This is justified on the premise that whatever is created by an agreement may be extinguished by agreement as captured by the maxim *eodem modo quo oritur, eodem modo dissolvitur*. In this case, the Claimant has not led evidence to prove that the leave days in the earlier agreement survived the agreement. On the contrary, the Executive Employment Agreement dated 18<sup>th</sup> December 2012 was self-contained as Clause 12(f) of the agreement affirms.

134. In effect, the Claimant cannot allege that he was entitled to 25 days' leave from 1<sup>st</sup> July 2008 to 15<sup>th</sup> October 2015. The 25 leave days entitlement ceased on 18<sup>th</sup> December 2012.

135. This proposition applies equally to the claim for unpaid 3 months termination notice which is based on the agreement dated 1<sup>st</sup> July 2008 which was discharged when the parties executed the agreement dated 18<sup>th</sup> December 2012.

136. The Respondent's witness confirmed on cross examination that the Human Resource Department dealt with operational affairs of the Respondent. It would therefore follow that only the Human Resource Department had data on the number of leave days the Claimant had accumulated.

137. The Claimant cited examples of former colleagues who had been paid for leave days. He asserted that the Finance Department which he headed paid one Rufus for 53 days in 2013 after having worked for only 2½ years.

138. As adverted to above, although the Claimant alleged that the Human Resource Department had confirmed the days, he provided no documentary evidence of such confirmation other than the email communication with the Human Resource Department. The Department did not contest the computation or provide a different number of days since the Respondent is the custodian of all records on leave days taken or not taken. It is unclear why the Respondent did not produce the relevant records to controvert the Claimant's claim on leave days assuming the Respondent had a different number. The submission that the Respondent had offered to pay the Claimant for a total of 31 days is unhelpful because, it does not explain how the number was arrived at in the first place. Such evidence would have helped the Court to determine whether the 92 days as alleged the Claimant were inclusive of the additional 34 days claimed as not taken under the contracts dated on 15<sup>th</sup> February 2002 and 1<sup>st</sup> July 2008 to obviate double compensation if any.

139. This Court is of the view that because leave is a statutory entitlement as well as a basic condition of employment and the parties had not agreed how the accrued leave days would be utilised and the Respondent provided no evidence to controvert the Claimant's allegations, the Court finds and holds that the Claimant is entitled to payment for the 126 leave days outstanding and was not entitled to 6 months' termination notice.

140. I thus find as follows in respect of the specific prayers of the Claimant –

(a) Terminal dues

(i) Interest at Court rates on the 3 months' pay  $3 \times 1,590,000 \times x = 143,100$ . Since the Claimant was terminated in accordance with the terms of the agreement, through a notice this claim was not proven and is rejected.

(ii) Unpaid 3 months from the 6 months' termination notice  $(3 \times 1,590,000) = 4,770,000$ . This claim is not sustainable since the earlier contract of service was discharged in its entirety and the parties were now governed by the new contract dated 18<sup>th</sup> December 2014. The claim is rejected.

(iii) Compensation for unfair termination  $(12 \times 1,590,000) = 19,080,000$ . Having found that the Claimant's termination was unfair and unlawful and coupled with the contemptible, humiliating and unwarranted manner in which the Respondent treated the Claimant on the evening and night of 15<sup>th</sup> October, 2014, the abrupt manner in which he was terminated and having regard to his rank in the organisation, the length of service, the Court is of the view that the equivalent of ten (10) months' salary would be fair compensation amounting to  $(1,590,000 \times 10)$  **Kshs.15,900,000/=**. For comparable jurisprudence on compensation for unfair termination, the Court considered the decisions in **Christopher Onyango & Others v Heritage Insurance Co. Ltd (2018) eKLR** where the Court of Appeal awarded 10 months' salary as compensation for unfair termination, **Kenfreight (EA) Ltd v Benson K. Nguti (2016) eKLR** where the Court of Appeal upheld the award of 12 months' salary awarded by the Trial Court as well as **Kenya Broadcasting Corporation v Geoffrey Wako (2019) eKLR** where the Court awarded 12 months' salary to an employee who had served for about 20 years.

(iv) Non-compete payments (12 x 1,590,000) = Kshs.19,080,000. Having found the claim for non-compete payments unproven the claim is rejected.

(v) Redundancy payment (1 x 1,590,000 x 13) = 20,670,000. Having found the claim of redundancy unproven, the claim for payment thereof is rejected.

(vi) Director's compensation (USD 1,000 x 4 x 5) = USD 20,000. Having found the claim for compensation for directorships in the five (5) IPSOS affiliate companies unproven, the claim is rejected.

(vii) Leave pay ( x 1,590,000) + ( x 1,590,000) = **Kshs.8,061,800/=**. Having found the claim sustainable the same is awarded as prayed.

(b) Declaration that the Claimant's constitutional rights have been infringed. Having found the claim for infringement of the Claimant's constitutional rights unsubstantiated, the prayer for a declaration to issue is rejected.

(c) General damages for defamation. Having found the claim for general damages for defamation unproven, the claim is rejected.

(d) Compensation of infringement of the Claimant's constitutional rights for the sum of Kshs.5,000,000. Having found the claim for infringement of the Claimant's constitutional rights unsubstantiated as required by law, the claim of Kshs.5,000,000 for the alleged infringements is rejected.

(e) Declaration that the Claimant validly remains a Director of IPSOS Market Research Services Ltd, Nigeria IPSOS Tanzania Limited, IPSOS Limited Uganda, IPSOS Limited Kenya and IPSOS Limited Ghana. Having found that the Claimant's directorship in IPSOS affiliated companies ceased with his termination on 15<sup>th</sup> October 2014 and the contract of service dated 18<sup>th</sup> December 2012 required him to resign on termination, the prayer for a declaration to issue is rejected.

**(f) Costs of this suit.**

**Because the claim is partially successful, the Claimant is awarded 50% of taxed costs of the suit.**

141. **In conclusion judgment is entered for the Claimant for the sum of Kshs.23,961,800/=.**

142. **Interest at Court rates from the date of judgment till payment in full.**

143. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2021**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**